U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date Issued: June 10, 1999

Case No.: 1997-INA-00024

***In the Matter of*:**

NINA'S ADULT RESIDENTIAL FACILITY,
Employer,

On Behalf of

EDNALYN MANZON,
Alien.

Certifying Officer: Rebecca Marsh Day, Region IX

Appearance: Michael J. Gurfinkel, Esq.

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This case arises from an application for labor certification filed on September 13, 1994, by Nina's Adult Residential Facility for the position of Facility Manager seeking labor certification for Ednalyn Manzon, Alien (AF 46). The duties of the job were described as follows:

> Teach basic academic & living skills to mentally impaired patients. Confer with social workers, family members, testing specialists & others. Instruct in daily living skills required for hygiene, safety & food preparation. Demonstrates activities such as bathing & dressing, to train residents in daily self-care practices. Serve meals and eat with residents. Restrain disruptive residents to prevent injury to themselves and others. Give medication as prescribed by physicians. Attend continuing education courses in dealing with developmentally disabled adult.

Employer required that applicants have ten years of education and two years of experience in the job offered or two years of experience teaching pre-school students. In addition, Employer required that applicants have a certificate in CPR, First Aid and residential services; experience teaching basic courses in psychology; be on call 24 hours per day and live on the premises.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on March 21, 1996 (AF 39-44). The CO stated that 20 C.F.R. § 656.21(g) requires that the text of the job advertisement must include the rate of pay, minimum job requirements and describe the job with particularity; that this is required so that U.S. workers can determine if they are willing, qualified, able and available for the job; that in this particular instance, both the job offer and text of the advertisement lacked a clear description of the job requirements. The CO stated that the job offer and text of the advertisement require that U.S. workers be available on call twenty-four hours per day. However, state regulations require that employees called to work under such circumstances must be compensated in accordance with applicable state regulations. Therefore, to be in compliance with 20 C.F.R. § 656.20(c)(7) Employer must amend the job offer and readvertise the job opportunity to state "must be available on call 24 hours per day; employer will compensate in accordance with California state law/regulations" (AF 41).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO stated further that the requirement that applicants have First Aid and CPR certificates is unduly restrictive and not normally required for the successful performance of the job in the United States (20 C.F.R. § 656.21(b)(2); that such training could easily be acquired after the applicant is hired. The CO then instructed Employer on the proper corrective actions.

Employer, by counsel, submitted rebuttal on April 29, 1996 (AF 19-38). Employer stated that it will readvertise the job deleting the CPR requirement but retaining the requirement of certification in First Aid and that it will amend the compensation rate to include one and one-half wages for overtime and will amend the work requirement to be "must be on call 24 hours" (AF 21, 28). Counsel stated that First Aid training is required by regulation in California. Citing section 80075 of Title 22 of the California Code which provides, in part, that "[s]taff responsible for providing direct care and supervision shall receive training in first aid from persons qualified by agencies including but not limited to the American Red Cross", Employer contends that it must hire an applicant with this training or it will loose its state license to operate a residential care facility (AF 20).

The CO issued a Final Determination denying certification on June 16, 1996 (AF 17-18). The CO stated that the proposed amendment to offer one and one-half wages for overtime does not satisfy the wage requirements in accordance with the NOF because state law/regulations may require Employer to pay more than one and one-half of the wage depending on the accumulation of overtime hours actually worked. The CO also stated that Employer did not satisfactorily document that the requirement of First Aid certification, as a pre-condition to employment, is common or a business necessity; that First Aid training is readily available and could easily be obtained after an applicant is hired and should not be used to exclude or discourage U.S. workers who may not possess such training at the time of interview.

Employer, by counsel requested administrative-judicial review of the denial of certification on August 1, 1996 (AF 1-16).

Discussion

The Alien in this case does not have 2 years of experience in the job offered, but instead could only qualify for this job, because the Employer also indicated that 2 years of experience teaching pre-school students would be acceptable. The Alien just happens to have 2 years of such experience.

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. The employer here did not indicate that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5). However, this application was

filed and the CO issued the final determination prior to our consideration of *Kellogg*. Therefore, will must remand this matter for further consideration.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED**, and this matter is **REMANDED** for consideration in accordance with *Kellogg*.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.